United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by:
M. E. DEORCHIS

75-7242

United States Court of Appeals

FOR THE SECOND CIRCUIT

PETER ROSENBRUCH,

Plaintiff-Appellant,

—against—

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

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Statement

Plaintiff-appellant has appealed from the decision and judgment of the District Court limiting recovery by plaintiff against defendant-appellee, American Export Lines, Inc., sued herein as American Export Isbrandtsen Lines, Inc. (hereinafter "Export"), to $500 in accordance with the package limitation set forth in the United States Carriage of Goods by Sea Act, 46 U.S.C. §1304(5) (A.B.—Page 28),* and in the bill of lading (17a).

This action was originally commenced in the name of Rosenbruch by Rosenbruch and his underwriters by the

* Plaintiff-appellant's brief.

filing of a Complaint on December 28, 1971 (18a-20a).** On that same day the action was assigned to Judge Tyler. This is an action in admiralty to recover the sum of $102,-917.08 for cargo admittedly lost in a trans-Atlantic crossing onboard one of Export's container ships during a storm. However, it has been stipulated that if the decision is reversed, plaintiff is to recover $35,000.

On June 18, 1972, defendant answered the complaint denying liability on behalf of the carrier (21a-23a).

Judge Tyler held pre-trial conferences from time to time inquiring as to the status of this case. On October 20, 1972, plaintiff's attorney and defendant's attorneys advised the Court that the only substantial question involved in this case was whether the $500 package limitation was applicable to the entire container or each individual item packed inside the container. If the container was a "package," carrier would waive defenses and settle on an economic basis. At that conference, Judge Tyler recommended that in order to try to bring this matter to a prompt conclusion, that Export make a motion for partial summary judgment for the purpose of settling this question. On December 7, 1972, a motion was filed requesting an Order granting partial summary judgment in favor of Export limiting plaintiff's recovery to $500 (24a-31a).

On December 19, 1972, plaintiff's attorney filed a cross-motion on behalf of Rosenbruch for summary judgment alleging that the defendant was guilty of a deviation and thus not entitled to any package limitation or in the alternative for summary judgment alleging that the defendant was not entitled to limit its liability to $500.00 (32a-43a).

** References to Appendix designated by Page Number, followed by "a".

On December 27, 1972, Export's attorneys filed a reply affidavit (44a-through-49a).

On January 26, 1973, extensive oral argument was heard by Judge Tyler in reference to Export's motion for partial summary judgment and Rosenbruch's cross-motion for partial summary judgment. The Court reserved decision. The District Court's Opinion, which is discussed below, was issued and filed on March 15, 1973 (5a through 14a).

Rosenbruch's attorney, after studying the Opinion, dated March 15, 1973, requested and was granted a further oral argument on the question of whether Export had committed an unreasonable deviation by stowing plaintiff's container on the weather deck of the S.S. CONTAINER FORWARDER.

On March 23, 1973, Judge Tyler heard extensive oral argument from both parties involving the deviation issue. At the conclusion of the argument, Judge Tyler ruled from the bench that plaintiff's cross-motion for summary judgment must be denied in all respects and that defendant's motion for partial summary judgment limiting plaintiff's recovery to $500 be granted. An Order denying plaintiff's cross-motion was signed by the Court on March 27, 1973 (15a-17a).

Plaintiff's attorney filed a Notice of Appeal on April 11, 1973, and an Amended Notice of Appeal on April 18, 1973. Appellant's attorney eventually withdrew the appeal based upon the fact that the District Court's Orders were not final and therefore could not be appealed to this Court as a matter of right.

No requests for certification were made to the lower court pursuant to 28 U.S.C. §1292(4)(b) for a petition to appeal under Rule 5, within ten days from the entry of the Orders.

A further conference was held before Judge Tyler on June 15, 1973, in reference to the final disposition of this matter. At that time, Judge Tyler informed both parties that no further action should be taken until the pending Appeal of *Royal Typewriter Co.* v. *M.V. Kulmerland,* 483 F.2d 645 (2nd Cir., 1973) hereinafter *Kulmerland* was decided. It was Judge Tyler's hope that the outcome of the *Kulmerland* decision would be conclusive as to the issue raised in this action.

The Second Circuit's opinion in *Kulmerland* came down on August 13, 1973. It was the opinion of both Judge Tyler and Export's attorneys that the "functional economics test" set forth in the *Kulmerland* case was dispositive of the package limitation issue raised in the present action. There was no question that the furniture was wrapped in paper and blankets or placed in the usual manner for moving household goods. Also, the use of the container, saved the shipper from paying for an expendable wooden van frequently used for household goods. Plaintiff's attorney rejected this approach and demanded his day in the Second Circuit Court of Appeals.

In order to permit this appeal, the parties stipulated to and a final judgment was entered on March 24, 1975, based on the Opinion dated March 15, 1973 and the Order dated March 27, 1973 (4a). The Stipulation between the parties became necessary in order for Rosenbruch to perfect an appeal to the Second Circuit as the issue of liability was not disposed of by defendant's motion for partial summary judgment and no timely request had been made by Appellant for certification. The Stipulation of Settlement was entered into on February 20, 1975.

Rosenbruch noticed this Appeal from the final judgment on April 15, 1975.

Export believes the judgment below is correct in all respects and should be affirmed.

Facts

Mr. Peter Rosenbruch, the appellant-plaintiff, hired an international freight forwarder, the 7 Santini Brothers International, Inc. and its affiliate, Santini Brothers, Inc., (hereinafter "Santini Brothers") to handle the complete movement of his household goods and effects from Norwood, New Jersey to Hamburg, Germany. The entire handling of the overseas movement, including the necessary paperwork portions and the details and passing customs clearance were to be handled by Santini Brothers. Instead of constructing a wooden van, Santini Brothers requested and was furnished by Container Marine Lines, a division of Export, a 40′ container, #183333. The container was picked-up by Santini Brothers and taken to Rosenbruch's New Jersey home at the shipper's expense.

On or about December 29, 1970, Santini Brothers delivered Container #183333 to Norwood, New Jersey and proceeded to pack Rosenbruch's household goods and effects into same, without the marking or packing any of the household goods or pieces in a van or other box which would be used if a container was not available. The 40′ container was to, and did serve, as the export protection, as did the 11′ box constructed by Santini Brothers that appears on the same bill of lading. (17a) Upon completion of the packing of the container, container #183333 was sealed by Santini Brothers with seal #4057-4058.

The service performed by Santini Brothers was described in their invoice as:

"Pick-up, pack for export in leased container and deliver to N.Y. pier" (See 43a).

Prior to the loading and sealing of the container, Santini Brothers booked passage for the container of household goods with Export for Hamburg.

Santini Brothers were informed by Export's Documentation Department that carriage would be onboard the S.S. CONTAINER FORWARDER, departing New York for Hamburg on or about January 9, 1971. In accordance with standard international freight forwarding operations, Santini Brothers using the standard printed forms of dock receipts and bills of lading, supplied to Santini Brothers by Export, filled in the particulars of the shipment. The description on the dock receipt and the bill of lading were identical. The particulars, typed by Santini Brothers, as shipper's agent, were as follows:

PART I—CARRIER'S RECEIPT		PART II—PARTICULARS FURNISHED BY SHIPPER	
Marks and Numbers Seal Number	No. of Cont. or other Pkgs.	Description of Goods	Measurements
Peter Rosenbruck	1	40′ CMLU #183333 Cont.	2205
c/o Home Pack Transport		Booking #8 used household goods	
GMBH		House to House Shippers	
Hamburg, Germany		Load & Count	
	1	11 ft. box used household goods	96

Once the necessary paperwork, including the filling in of the dock receipt and the bill of lading by Santini Brothers was completed, a Santini Brothers' truck picked-up container #183333 from New Jersey and delivered it to Pier #13, Staten Island, on January 8, 1971. The receiving clerk at Pier #13 acknowledged receipt of the container as follows:

"1/8/71 Santini Bros. LIC 55479 Cont. CMLU 183333 Seal 4057-4058 Rec. One (signature illegible)."

The completed bill of lading was then taken to the export documentation section of Export and was signed, dated, numbered and returned to the shipper. The bill of lading was dated January 9, 1971, designated bill of lading No. 5. The carrier also at that time filled in the name of the vessel that the container was to be carried, "FORWARDER", which is an abbreviation for the container vessel S.S. CONTAINER FORWARDER, and placed a rubber stamp "SHIPPER'S LOAD AND COUNT" as well as crossing out Santini Brothers' remark: "Stow under deck only" (See 12a-13a). The reason for this, as Santini Brothers should have known, if it had read the applicable tariff, was that the Rule 13C of the North Atlantic Continental Freight Conference did not permit issuance of under deck bills of lading for containers (49a). Santini Brothers accepted the change. Plaintiff offered no evidence of any protest.

On or about January 9, 1971, sealed container #183333 was loaded onboard the container vessel, S.S. CONTAINER FORWARDER. The CONTAINER FORWARDER was a specifically designed container carrier approximately 583 feet long solely constructed for the carriage of 20 and 40 foot ocean shipping containers. The CONTAINER FORWARDER had been equipped to carry containers on-deck by using special deck fittings, lashing and a strengthened weather deck.

Container No. 183333 was stowed on deck, along with numerous other containers for the trans-Atlantic crossing.

The vessel sailed from New York on or about January 9, 1971, with a full load of containers. During the course of

the trans-Atlantic crossing, extremely heavy weather was encountered and approximately 32 containers were damaged or lost over the side.

Upon being notified of the loss, plaintiff-consignee brought suit against American Export Isbrandtsen Lines, Inc. and after a motion for partial summary judgment, the District Court held plaintiff's recovery would be limited to $500.

Plaintiff-appellant appeals from the limitation of its recovery to $500.

POINT I

The District Court was correct in holding Container No. 183333 to be a package and limiting Plaintiff-Appellant's recovery to $500.

The shipment in question was carried by Export in accordance with the terms of a Bill of Lading Contract issued at New York (17a). The bill of lading provided that the package limitation of the Carriage of Goods by Sea Act should apply (14a).

The Carriage of Goods by Sea Act, 46 U.S.C. §1304(5) states:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and

> value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. * * * By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. * * * "

The bill of lading contract of carriage as embodied in Bill of Lading No. 5, contains the following paragraph in reference to the package limitation:

> "17. In case of any loss or damage to or in connection with goods exceeding in actual value the equivalent of $500 lawful money of the United States, per package, or, in case of goods not shipped in packages, per shipping unit, the value of the goods shall be deemed to be $500 per package or per shipping unit. The Carrier's liability if any, shall be determined on the basis of a value of $500 per package or per shipping unit or pro rata in case of partial loss or damage, unless the nature of the goods and the valuation higher than $500 per package or shipping unit shall have been declared in writing by the Shipper upon delivery to the Carrier and inserted in this bill of lading and extra charge paid."

No value of the goods were declared, nor was any value inserted in the bill of lading (12a-13a—lower left hand corner).

The Plaintiff-appellant criticizes the decision of the District Court in holding the container to constitute a package based on what appellant's attorney believes should be the

law in the Second Circuit. Appellant's attorney throughout his entire brief simply argues that he fails to see any consistency or coherence in the last four container cases decided by this Court of Appeals (A.B.—pages 9 through 23).

The facts as set forth by Mr. Simon are somewhat misleading. On pages 6-7 he states:

> "The steamship company, in preparing its printed form of bill of lading . . . . (29a), made no provision for the shipper to state the number of packages stowed within the container when the packages are containerized . . . . Clause 6 of its bill of lading provides: '. . . This bill of lading is a receipt only for the number of containers . . . .'"

In fact, Clause 6 reads:

> "This bill of lading is a receipt only for the number of containers, or packages or pieces . . . ."

The RECEIVED Clause at the top of the reverse side states:

> "RECEIVED the number of containers or other packages or pieces stated in Part I paid by the shipper to hold the goods described in Part II."

Part I, the Carrier's Receipt, permits the shipper to list the "No. OF CONT. OR OTHER PKGS." Knowing what was the ocean package, Santini Brothers typed "1" in that column. The contents were simply described as used household goods, the same as was done for the 11′ wooden container or box constructed by Santini Brothers.

Also, misleading in Mr. Simon's facts is the assertion now made on Page 4 of his brief that Santini Brothers' invoice "indicated that the packers used 129 packages in packing the goods 'for export,'" and that the steamship company "admits the goods were packed for export, in these words":

> "There can be no doubt that the goods were packed for export in the container as Mr. Simon's Exhibit 3 confirms."

The clear implication now being made for the first time by Mr. Simon is that the goods were packed "for export" in the *Kulmerland* sense, i.e., that they could have been shipped without a container. The invoice (43a) states:

> "pack for export in leased container"

as to the goods shipped in the container and "pack for export" as to the goods shipped in the 11′ box van, built by Santini Brothers. The goods which were not simply wrapped, were put in dishpacks, cartons, crates, wardrobes and mattress cartons in the usual way of movers (43a). Three pages from a Santini Brothers' brochure are attached to this brief for illustration, as we do not believe Mr. Simon is intentionally trying to mislead the Court and therefore, we do not believe he will object. (See pp. 47-49.)

The lower Court in limiting any recovery in this case to $500, noted that it did not fall under either of the extremes represented by the *Royal Typewriter Co.* v. *M.V. Kulmerland* District Court Opinion, 346 F. Supp. 1019 (S.D.N.Y., 1972), or the *Leather's Best, Inc.* v. *Mormaclynx* Court of Appeals Decision, 451 F.2d 800 (1971) (hereinafter

"Leather's Best"). It felt the case more readily approximated the intentionally undecided hypothetical set out by Judge Friendly in *Leather's Best,* 451 F.2d 815.

At the time Judge Tyler decided the present case, the most recent Court of Appeals authority in the Second Circuit was *Leather's Best.*

In that case, a 40′ container was delivered to the inland German shipper at Weinheim, Germany and 99 bales of leather were loaded into the container by the shipper and then sealed. At the time of the loading, a truckman had been engaged by an agent of the carrier, to tally the goods. The truckman gave a receipt for 99 bales which he observed being loaded. The Court of Appeals held that the truckman was acting on behalf of the carrier. 451 F.2d at 804.

The ocean carrier's agent at Rotterdam issued a bill of lading which described the goods as "1 container s.t.c. 99 bales of leather". The lower left hand corner of the bill of lading stated that the shipper agreed to the carrier's liability, which was limited to $500 per container except when the shipper declared a higher valuation and paid an additional freight charge based upon the value.

Eventually, the S.S. Mormaclynx arrived in New York and the container was discharged, but never delivered as the container was discovered empty on Long Island.

The consignee commenced an action in the Eastern District of New York seeking damage in the amount of $155,192.00, the alleged value of the 99 bales of leather. The defendant-carrier contended that the container was the "package" within the meaning of both the Contract of Carriage and COGSA.

The District Court concluded that since the carrier had actually counted the bales before they were put in the container, the container was not a "package" within the provision of the $500 package limitation section of COGSA, and also invalidated the bill of lading purporting to provide for such limitation.

On appeal, the Second Circuit addressed itself to the issue of the extent of the carrier's liability—more specifically the validity of the limitation of $500 per container and basically affirmed the District Court's opinion, holding that the term "package" as used in COGSA relates to the units in which the shipper packed the goods and described them, rather than a container used at the urging of the carrier. However, Judge Friendly, writing for the majority, did not hand down an answer for all container litigation. The holding in that case, if analyzed carefully, stands on those particular facts. Judge Friendly left open the question of package limitation under other possible circumstances:

> "[I]t leaves open, for example what the result would be if Freudenberg had packed the bales in a container already on its premises and the bill of lading had given no information with respect to the number of bales. There is a good deal in Judge Hays' point in his dissent in the *Encyclopaedia Britannica* case, see fn. 16, 'that promotes uniformity and predictability,' at least where it contains a goods of a single shipper. It is true also that the standard arguments about the economic power of the carrier and the weak bargaining position of the consignor may be simply a recitation of an ancient shibboleth, at least as applied to shipments of containers fully packed by the shipper. The

> shipper insures for any value in excess of the limitation (or perhaps for the whole value) and, for all we know, a ruling that each bale constituted a 'package' may simply be conferring a windfall on the cargo insurer, admittedly the true plaintiff here, if it based its premium on the assumption that Mooremac's liability was limited to $500 . . ." (footnotes omitted) 451 F.2d at 815-816.

The District Court Judge in this case carefully analyzed the holding in *Leather's Best* and noted the Court of Appeals:

> ". . . indicated the understanding of all concerned that the individual bales were packages shipped, and that the container was essentially a device for the carrier's convenience in handling and stowage, and also found relevant, the carrier therein could not deny knowledge of both the nature of the cargo and the number of packages employed to ship it" (8A).

Judge Tyler, specifically referring to Judge Friendly's language quoted above from *Leather's Best,* noted that the case at bar:

> "closely approximates the intentionally undecided hypothetical set out by Judge Friendly, varying only in that Santini did not own No. 183333, nor did it have it 'already on its premises' " (9a).

However, Judge Tyler did find that:

1. Selection of the CONTAINER FORWARDER was made by Santini Brothers as shipper's agent;
2. Santini Brothers requested use of the container, with the proviso that it hold only shipper's goods;

3. Santini Brothers loaded container at shipper's premises;

4. The bill of lading indicated only "1" under the entry "Number of Cont. and/or Other Pkgs."

5. The cargo was simply described as "used household goods" (9a).

Judge Tyler noted that the ownership or possession in and of itself of a container should not and can not be dispositive as to whether a container is a package or not.[1] Judge Tyler stated that the entire "record must be considered an inference is drawn as to the knowledge of the shipper and carrier—and the mutual understanding of the parties" (9a).

Appellant's attorney, basing much of his argument on the *Leather's Best* decision, argues vigorously that under the principle of *stare decisis,* the *Leather's Best* decision should have been followed by Judge Tyler simply because both cases happen to involve 40′ containers belonging to carriers. Mr. Simon notes:

> " . . . since, basically, the facts are the same: both cases involve goods packed for export in 40 foot containers belonging to the steamship company. The decision of Judge Tyler in the instant case reflected his disregard for and complete basic disagreement with the decision of this Court in *Leather's Best,* and a

[1] Today more often than not containers are owned by banks or leasing companies who lease them to ocean carriers, truckers and shippers, and containers are freely interchanged in the trade.

> hasty attempt to reinforce his contrary *Royal Typewriter* decision, which was being appealed at the time" (A.B. Pages 13-14).

It is evident from a simple reading of Judge Tyler's opinion that Mr. Simon's statement is totally incorrect. Judge Tyler not only considered the *Leather's Best* holding, but correctly interpreted Judge Friendly's application of the $500.00 package limitation. In fact, the lower Court best summarizes this point in the closing paragraph of the opinion, which states:

> "[T]o summarize, the present record reveals that the selection of Voyage 42 and the S.S. Container Forwarder was made by Santini as shipper's agent; and that Santini requested use of carrier's container, with the proviso that the container hold only shipper's goods. *No showing has been made that the carrier was unduly involved in the preliminary operations, as it was in Leather's Best.* It is ruled, therefore, that the container No. 183333 is a package for the purposes of Section 4(5) of COGSA, 46 U.S.C. §1304(5)." (Emphasis added) (11a).

The real complaint that appellant's attorney, Mr. Simon, has with the holding of the lower Court in this case is a container, any container, was held to be a "package," subject to a $500 limitation. It is no secret that Mr. Simon has been an advocate in this Circuit seeking to have the circuit adopt a strict rule of law that: A container can never be a package, under any circumstances. See Simon, "Law of Shipping Containers," 5 J. Mar. Law and Comm. 507 (1974)

and Simon, "More on the Law of Shipping Containers," 6 J. Mar. Law and Comm. 603 (July, 1975). In fact, in each article he has written, Mr. Simon has criticized not only the district courts, but also this Court's holdings in *Standard Electrica S.A.* v. *Hamburg Sudamerikanische, etc.,* 375 F.2d 943 (2nd Cir., 1967), *cert. denied* 389 U.S. 831 (1967) (hereinafter "Standard Electrica") as well as *Leather's Best, supra,* with respect to those portions of the decisions which were not favorable to cargo interests. See Simon, "Admiralty Jurisdiction and Liability of Wharfingers," 3 J. Mar. Law and Comm. 513 (1972).

Recent pronouncements from the Second Circuit Court of Appeals in *Royal Typewriter Co.* v. *M.V. Kulmerland,* 483 F.2d 645 (2nd Cir., 1973), require further discussion. In *Kulmerland,* this Court was faced with a shipment of 350 adding machines that were delivered by a German manufacturer in Berlin to its freight forwarder along with 700 other machines, each packed in a single wall, corrugated carton. The freight forwarder, pursuant to the directions of the shipper, placed the cartons in three containers, each containing 350 cartons and sealed the doors. These containers were then transported and loaded onboard the M.V. Kulmerland. An ocean bill of lading was issued for all three containers, including the one in question. The issued bill of lading described the goods as follows:

> "Number and Kind of Packages; Description of Goods.
>
> "1 Container said to contain machinery." 483 F.2d at 646.

The KULMERLAND arrived in New York and the container loaded with what was said to be 350 cartons of adding machines was discharged. While the container was stowed in the terminal farm area, the entire contents of the container were pilfered.

The consignee commenced an action in the Southern District of New York seeking recovery in the amount of $29,000, the alleged value of the 350 adding machines. The defendant-carrier contended that the container was a package within the meaning of both the contract of carriage and COGSA. The District Court, as per Judge Tyler, concluded that the container was a "package" within the meaning of COGSA and the contractual provisions of the contract of carriage as evidenced by the provisions found in the bill of lading and the plaintiff-consignee was therefore limited in its recovery for the loss of the goods to $500.

On appeal the Second Circuit addressed itself to the question of the amount of the loss in light of the COGSA package limitation and to the seemingly conflicting opinions within its own Circuit. The Court fully realized that the trial judge had to deal with the other package limitation cases existing in both the District Court and the Second Circuit at that time and in doing so, had to attempt to set a course that satisfied the requirements of *Standard Electrica, supra,* on one hand and *Leather's Best, supra,* on the other hand, with "Judge Hays' dissent in *Encyclopedia Britannica infra,* thrown in for good measure, all in a field crying for new legislative action. . . . " 483 F.2d at 648. For a discussion of the District Court's and Court of Appeals' decisions, up to the *Kulmerland* decision, see DEORCHIS, "The Container and the Package Limitation—The Search for Predictability," 5 J. MAR. LAW AND COMM. 251 (1974).

The manner the Court of Appeals chose to settle this question was labelled by the Court as its:

"functional economics test".

In deciding this case, the *Kulmerland* panel held that: "the first question in any container as a package case was whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper." 483 F.2d at 648-649. It points out that the shipper in the *Kulmerland* case never had shipped adding machines in cardboard cartons alone, and that in the days before containerization, the cartons were shipped in wooden cases. The Court found:

> "[u]ntil the adding machine cartons were packed in the container in question, they were not suitable for ocean transportation or handling." 483 F.2d at 649.

Therefore, in *Kulmerland,* the container was the package.

The *Kulmerland* panel also took great pains to distinguish *Leather's Best,* by noting that the "bales" were cartons 4′ by 2′ by 1½′, with steel straps. The bales were functional units suitable for shipment as is, like the coils in *Nichimen Co.* v. *M.V. Farland,* 462 F.2d 319 (2nd Cir., 1972).

The Court in the *Kulmerland* case also set down some rules of evidence relating to burden of proof:

1. Where the shippers' own packing units are functional, a presumption is created that the container is not the "package" which must be overcome by evidence supplied by the carrier that the parties intended to treat it as such.

2. Absent the shipment in a functional packing unit the burden shifts to the shipper to show by other evidence that his units are in themselves "packages". Such evidence might include custom and usage in the trade, parties' own characterizations, or other factors bearing on the parties' intent. 489 F.2d at 649.

The present litigation was tried by Judge Tyler before this Court decided *Kulmerland, supra.* The decision of Judge Tyler, however, does refer to the lower Court decision in *Kulmerland.* The lower Court decision in *Kulmerland,* as noted above, was decided on the controlling law at the time.

However, the functional packing unit test can be applied in this case. The Appellant's attorney disagrees and argues that the *Kulmerland* case should not be applied to the present set of facts based, not on lack of evidence or that this decision predates the *Kulmerland* announced test, but rather on the grounds that the *Kulmerland* test is unsound and unworkable. It is submitted that this is pure rhetoric as the most recent cases both from this Court and the District Court show that the *Kulmerland* decision has started to lend a degree of predictability to, what was prior to the *Kulmerland* decision, an extremely grey area.

Appellant's arguments are numerous and varied but they all boil down to the simple facts that Appellant cannot overcome the first question required to be answered in any container case. That question as outlined above is whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper. The designated

shipper on the bill of lading in this case, Santini Brothers, Inc., an international freight forwarder, had the initial choice of shipping Rosenbruch's household goods any way it chose. Although no testimony was taken as to the method used by Santini Brothers and other international freight forwarders engaged in the overseas household moving trade, it is well known that the household goods, such as furniture, tables, couches, bedding, and chairs are wrapped and sometimes padded for safety and protection, prior to being packed inside a lift van or large wooden box built especially for that purpose. It is beyond dispute that prior to containerization, international freight forwarders engaged in this trade were forced to use such expendable boxes. In fact, such a box, 11 foot in size, appears on the same bill of lading, no doubt because the 40′ container could not hold all the goods. In other words, the household goods could not have been shipped as packed independent of the same large wooden crate. Even Mr. Simon will not claim that household goods are shipped by packing each chair, sofa and lamp in a separate box!

It is not difficult to understand the shipper's reasons in choosing to substitute containers for wooden crates. By using the container, obviously the shipper avoided the heavy expenses involved in providing or constructing wooden crates to contain a shipment the size of Mr. Rosenbruch's. The use of the container also resulted in the reduction of the handling of the household goods and increases the facility in supplying and servicing the customer by using one 40′ package rather than a number of smaller vans. The shipper also realized the additional advantage of a discount with respect to ocean freight by employing the container as its package. See attachments A through C from a

brochure entitled "The 7 Santini Brothers Export Packing Division." These attachments only show how the household goods would have been shipped and indeed are still shipped if containers are not used.

In the present case, it was the shipper alone who chose to employ the container as its package. The shipper obtained a container from Container Marine Lines, and arranged for it to be delivered by local trucker to Rosenbruch's home in Norwood, New Jersey, for his exclusive use. The container was packed and sealed by the shipper and the shipper arranged for the inland transportation from Norwood, New Jersey, to the Port of New York. The shipper, Santini Brothers, described the shipment in the bill of lading as a "40′ CMLU No. 183333 CONTAINER BOOKING NO. 8—USED HOUSEHOLD GOODS—HOUSE TO HOUSE SHIPPER'S LOAD AND COUNT." The shipper also typed that portion of the bill of lading, Part I, that was to become the carrier's receipt. It described the number of containers or other packages shipped as "1."

At Pier 13, in the Port of New York, a container packed and sealed by the shipper was presented to the ocean carrier for shipment. Export, the ocean carrier, had nothing to do with the choice of the container (instead of a van), packing it, sealing it, or preparing the description in the bill of lading. All it got was one sealed container and that was the only receipt it could give. Therefore, under the *Kulmerland* test, appellant has the burden of proof to show that the container was not a package, since its goods could not have been shipped without the container. The Court, in placing this burden on the shipper, states:

> "Absent shipment in a functional packing unit, the burden is on the shipper to show by other evidence that his units are themselves 'packages.' Only then does custom and usage in the trade, the parties' own characterizations, or treatment of the items being shipped and supporting documents or otherwise and any other factor bearing on the parties' intent become relevant as in *Standard Electrica,* or *Leather's Best.*" 483 F.2d ... 649.

Appellant has not shown and indeed cannot show any evidence that the individual household items inside the container were themselves packages. However, assuming *arguendo,* that appellant could carry such a burden, the carrier here could still overcome the presumption created under *Kulmerland* that the container was not the package. It seems to be undisputed that:

1. All the documentation handled by the shipper, including the bill of lading and dock receipt, emphasized the fact that the shipper intentionally chose the container as its package and used it as such. The container was packed at the shipper's premises. Santini Brothers got from the carrier for the exclusive use of its client in which to ship his furniture.

2. That the carrier, upon receipt of the sealed container, had no indication or knowledge, either from the shipping documents or from an actual inspection what was inside the container, other than "used household goods."

3. If instead of taking advantage of the 40′ container, the shipper had paid to have a 40′ van built by Santini Brothers, Mr. Simon could not claim that was not a pack-

age. *Aluminos Pozuelo Ltd.* v. *S.S. Navigator*, 407 F.2d 152 (2nd Cir. 1968).

It is submitted that the lower Court's decision as reported in the present case is correct in all respects, but if this Court chooses to apply the later annunciated functional economics test, the facts surrounding this case must result in an affirmance of the $500 package limitation.

Since the annunciation of the *Kulmerland* test, at least two cases in this Court and at least two cases in the District Court have applied the functional economics test with equitable results. The first case in this Court, after *Kulmerland*, to consider the *Kulmerland* case was *Shinko Boeki Co. Ltd.* v. *S.S. Pioneer Moon*, 507 F.2d 342 (2nd Cir., 1974) (hereafter "Pioneer Moon"). In that case, Plaintiff was appealing from a judgment of the District Court in an action to recover damages for the loss of approximately 56 tons of liquid latex, in the amount of $5,500, computed on the basis that each of the 11 tanks furnished by the ship to transport the latex, constituted a package within Section 4(5) of COGSA. The author of the Court of Appeals opinion was Judge Friendly. Judge Friendly noted, as he did in his *Leather's Best* opinion, that the initial question in any package case was to make sure that the purpose of the $500 package limitation was not frustrated by allowing the carrier to set a limitation in violation of 1303(8) of COGSA.

Judge Friendly found three possible methods for ocean transportation of liquid latex were:

1. in fifty-five gallon metal drums;

2. bulk stowage of the liquid latex into the ship's deep tanks; and

3. the carriage of bulk liquid latex in portable tanks.

Judge Friendly noted that the fifty-five gallon drums clearly would have been packages. Liquid latex pumped into the ship's tanks clearly would not have been packages, although they would have been subject to the $500 per shipping unit limitation.

In reference to the third method which was employed, the court found that the 2,000 gallon portable tanks were filled at the carrier's facilities, the latex being pumped into the tanks while the latter were on the deck of the vessel and apparently filled under the supervision of a representative of the carrier.

Obviously, based upon the facts as presented to the Court, Judge Friendly found that the tanks furnished by the carrier were not packages, but instead the Court stated:

> "We believe the liquid latex was within the exception for 'goods shipped in bulk.'" 507 F.2d at 345.

The interesting point in the *Pioneer Moon* case as it relates to the one at bar is that Judge Friendly went to great pains to note that the decision in that case was not inconsistent with the *Kulmerland* decision. The Court found that the functional economics test announced in *Kulmerland* "affords little help with respect to bulk shipment of a liquid." The real impact of the *S.S. Pioneer Moon* case is not upon the *Kulmerland* test, as believed by appellant's attorney, but rather in the Court's own words:

> ". . . our decision here should provide a fair degree of predictability within this circuit with respect to liability for ocean transport of bulk liquids until the issue is resolved by a higher authority or by treaty. See

Royal Typewriter Co. v. *M.V. Kulmerland, supra,* 483 F.2d at 648". 507 F.2d at 346.

The only reason we mentioned the *Pioneer Moon* in this case is that Appellant has placed false reliance on the holding in the *Pioneer Moon* case. It goes without saying that the *Pioneer Moon* case is not the standard container as a package problem, but rather deals with liquid bulk shipments, which can never be packages.

The first real opportunity that the Court of Appeals has had in applying the functional economic test was realized in *Cameco, Inc.* v. *S.S. American Legion,* 514 F.2d 1291 (2nd Cir., 1974) (hereinafter "Cameco"). The facts in *Cameco* were that 500 cartons and 4 pallets of hams were shipped from Denmark via the Port of Hamburg to New York. The shipments were placed in a container owned by U.S. Lines, at the shipper's place of business in Denmark. The carrier, United States Lines, then arranged for pick-up of the container and delivery to the pier in Hamburg. A bill of lading was issued for the shipment aboard the S.S. American Legion, but thought never to have been carried on that vessel. The container, however, was actually loaded aboard the S.S. American Legion on a later date, much to the surprise of United States Lines.

The S.S. American Legion arrived in New York and discharged the container. Due to the confusion between what vessel was being used and the delay, the container was stolen.

With regard to the package limitation question, the lower Court held:

> "The bill of lading here shows the container owned and furnished by the Defendant was used to package the cargo and this cargo consisted of 500 cartons and 4 pallets of ham. Containerization was at the request of the carrier. The carrier had notice of the number of packages of merchandise that it was carrying in the container. Absent the container, the cartons would have been shipped individually. *Royal Typewriter Co.* v. *M.V. Kulmerland,* 483 F.2d 645 (2nd Cir., 1973). Thus, the ruling in *Leather's Best, supra,* at 815-816, the limitation of $500 in Paragraph 24 of the bill of lading does not apply to this container." 1974 A.M.C. at 1855 (S.D.N.Y., 1973) (not otherwise reported).

On appeal, in a decision by Circuit Judge Oakes, the author of the *Kulmerland* decision, noted in reference to the application of the functional economics test that:

> "[T]he only evidence in the case related to 'packaging', was that cans of ham are customarily shipped in corrugated cartons or cases such as those used here, whether those cartons are shipped in containers, on pallets or as loose cargo. There was testimony that the corrugated cases were the form of packaging for loose cargo or bulk shipments, prior to the days of widespread use of containerization." 514 F.2d at 1294.

In reference to the *Kulmerland* decision, Judge Oakes noted that this case, *Rosenbruch,* was consistent with it:

> "[T]hat the *Kulmerland* test is by no means conclusive of the results; it simply goes to the burden of proof. Recent District Court cases are consistent with

Kulmerland. Rosenbruch v. *American Export Lines, Inc.*, 357 F. Supp. 982 (S.D.N.Y. 1973) (Tyler, J.) held in the case of household goods in a container, where the bill of lading referred to '1' under the entry 'Number of Cont. and Other Pkgs.' and described the contents as 'said to contain household goods', and that the container was a single package. So, too, *Sperry Rand Corp.* v. *Norddeutscher Lloyd, supra,* held in the case of a container shipment of 190 cartons of shavers, with a bill of lading referring to a container as a package and describing the contents as 9,500 apparatus electrical dry shavers, but no indication that 190 cartons were inside, the container was a package looking to the parties' intent." 514 F.2d at 1298-1299.

The interesting point in the case is that Judge Oakes was fully familiar with the facts in *Rosenbruch,* from not only a reading of the lower Court decision, but from a full oral argument presented by the parties involved in the *Kulmerland* appeal. (See 483 F.2d at 648.)

After reviewing all of the evidence in *Cameco,* the Court stated:

> "it is apparent that under *Kulmerland* the cases of tinned hams and the pallets of tinned hams respectively meet the functional packaging unit test of *Kulmerland* and accordingly, put the burden of proof on the carrier to supply evidence that the parties intended to treat the container as a package. *This the carrier did not do.*" (Emphasis added.) 514 F.2d at 1299.

The Court noted that the reason the container could not be considered a "package" was that the carrier did not overcome the presumption by supplying evidence that the

parties intended to treat it as such. The Court noted that the trucker, who carted the carrier's container was the carrier's agent and was present at the time of the shipper's tally and count and could have "participated in it". Also, the bill of lading specifically set forth the number of cartons of tins and the respective number of tins and weight per tin in each carton. The Court noted this was:

> "Unlike the one container said to contain machinery in *Kulmerland,* or the one container said to contain household goods in *Rosenbruch.*" 514 F.2d at 1299.

Interestingly enough, Judge Oakes repeats as *dicta* in *Cameco* that where cargo is not found to meet the functional packing test, the shipper will have to overcome the presumption that he use the container itself as a package. Judge Oakes again referred to *Rosenbruch*:

> "[w]hether or not there is an economic waste is created by a shipper packing in functional units, when a container is available depends on whether the goods would have to be repacked for distribution if not functionally packaged at the place of origin. Knowing where the presumption lies, the shipper may still decide it is more economical to use a container as a package when it is more expensive to package the goods rather than insure them, such as household goods in *Rosenbruch.*" 514 F.2d at 1299.

Judge Tyler in his decision in *Rosenbruch* states as one of the points to consider in deciding the allocation of the risk in a package limitation case, is the question of insurance. Judge Tyler noted that COGSA, while predating containers, did not predate marine insurance. One of the

realistic questions that must be answered in this regard is whether the carrier should be required to increase its overall coverage, thereby passing on the cost to all shippers, or leave the option of full valuation in the hands of the individual shipper, allowing the shipper to obtain coverage above $500 if so desired, by buying full coverage from his own underwriters or by declaring the value in the bill of lading and paying extra charges to the ship line.

When the shipowner has to provide "declared value" coverage for the shipper, the additional cost is higher than the coverage the shipper could purchase from his own underwriter. The more risk the carrier must accept, the higher the total freight rate must be.

The reason the cost of declaring full value in the bill of lading exceeds the cost of obtaining full coverage from cargo underwriters has to do with the nature of the shipowner's P & I policy which is rated upon a maximum liability. Cargo insurance spreads the cost among many cargo interests in direct relation to the nature of their risk, based upon known values, whereas the cost of P & I insurance is spread over freight rates on an average basis, with the accumulated burden of loss falling on one policy based on an estimate of maximum exposure. See McDowell, "Containerization: Comments on Insurance and Liability," 3 J. Mar. Law & Comm., 503-507 (1972). The shipper knows the value of his cargo and can limit the coverage he buys to that value. The carrier can only guess and tends to buy more than enough. The cost of this insurance is "forced" upon the shipper through the freight rate.

The shipowner who invests millions of dollars on containerships and containers obviously does not encourage

containerization by taking the position that all the cargo shipped in one of his containers will be worth no more than $500 if a loss occurs. On the other hand, the need for a limitation of some kind seems to be even greater in the case of containers than it was in the case of breakbulk shipments. House-to-House containers are loaded and sealed by the shipper. In the old days, the carrier at least could tell whether he was receiving television tubes or bales of cotton, but sealed containers all look alike.

The Court of Appeals decision in *Cameco* recognized that the "ultimate question in the cargo case, is usually one of allocation between cargo underwriters on one hand and the protection and indemnity (P & I) insurer of the carrier on the other hand." In discussing the interplay of marine insurance, the Court further noted:

> "[T]he gross cost of transportation insurance to the cargo owner includes the premium he pays his own underwriter directly, plus the carrier's insurance expense which is built into the freight rate and covers the risk the carrier undertakes in the bill of lading or that are imposed upon him by law. Utilizing a burden of proof which allocates risk according to the manner in which the goods are individually packed will, perhaps, until some better test is devised, give more predictability to the allocation of insurance risks." 514 F.2d at 1300.

When all is said and done, two points remain steadfast in the package limitation dispute. First, that Congress set the figure of $500 and Congress should change it, not the Courts. Secondly, no one is going to pay to insure the shipper's property except the shipper. The shipper can do

it by himself by buying cargo insurance or the carrier can do it for him and include the cost in his freight rate. Obviously, if the package limitation were $50,000 instead of $500, the freight rate would be much higher. (See 48A.)

Not only did the shipper employ the container as a package in this case, it also was in the position to declare a higher value to avoid any package limitation. The use of the container was not unfamiliar to Santini Brothers as it had been long engaged in the overseas household moving business as an international forwarding agent conducting business in the Americas, as well as Western Europe and the Far East. (See Attachment A through C.)

Congress, in adopting the Carriage of Goods by Sea Act, was well aware of the ability of the shippers to protect themselves from limited liability on a package basis, by merely declaring the value of the shipment. This is clear by examining the records of the Hearings Before the Committee on Commerce, United States Senate, 74th Congress, First Session, on a bill relating to the Carriage of Goods by Sea, May 10, 1935 at Pages 38 and 39:

> "The Chairman: Can you make reference, Colonel Barber, to that page of your memorandum, so that the record will show it? I am anxious only that the record should be clear on it, because you have to bear in mind most of us are laymen so far as shipping terms are concerned, and it would be well if we knew the reasons for those things.
>
> "Mr. Barber: There is a brief supporting argument on that * * *:
>
> "'Limitation of Liability. The Harter Act makes no direct reference to valuation clauses. Limitation of

liability, however, is permitted, provided it falls short of relieving the carrier from all responsibility for loss or damage arising from the negligence of himself or his servants. Hence, it was assumed in a case before the United States Supreme Court that a liability limited to $100 on a car worth $3900 was not improper. The White Bill imposes a liability of $500 per package or customary freight unit; with *the parties free to agree upon a higher figure if they wish.*'

"Mr. Walter: If I may take up following that, you will note on page 9 of the bill where we fix the maximum amount of $500 per package, we say that is supplemented in the lines 13 to 18 referred to by the chairman, which we may agree on something higher than that.

"In other words, it may be an automobile in the package, and it will be worth considerably more than $500, and there the primarily interested parties wanted that ante raised." (Emphasis added.)

The Committee on the Merchant Marine and Fisheries of the House of Representatives also considered this point:

"Mr. Davis: Why should not they be liable for the full value of the package? $500 might be sufficient in most cases, but suppose there is a package worth $50,000, what would $500 recovery amount to?

"Mr. Haight: All you have to do is to go to the carrier and say, 'this package is worth $50,000.'

"Mr. Bland: If he declares the value, they are liable?

"Mr. Haight: All he has to do is to declare the value and pay a higher freight rate." (Hearings before the Subcommittee of Foreign Relations, 70th Congress, First Session, 9-10 (December 22, 1927).

This Court has also recognized the ability of a shipper, at its option to obtain full coverage:

> "simply by declaring the nature and value of the goods in the Bill of Lading, and, if necessary, paying a higher tariff, and thereby avoid the 'outdated' limitation." *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfshiffahrts—Gesellschaft, supra* at Page 946. See also *Aluminos Pozuelo Ltd.* v. *S.S. Navigator,* 407 F.2d 152 (2nd Cir., 1968); *Nichimen Company, Inc.* v. *M.V. Farland, supra; Mitsubishi International Corp.* v. *S.S. Palmetto State,* 311 F.2d 382 (2nd Cir., 1962).

The container was chosen and employed as a package and, likewise, the choice was made by the shipper not to declare a higher value in excess of the limitation applicable to that package.

> "If through the passage of time this statutory limitation has become inadequate and its application inequitable, a revision must come from Congress, it should not come from the Court." *Standard Electrica, supra,* at Page 946; see also *Nichimen Company* v. *M.V. Farland, supra;* and *Aluminos Pozuelo Ltd.* v. *S.S. Navigator,* 407 F.2d 152 (2nd Cir., 1968).

In view of the specific choice of the container as the package in which the household goods would be shipped, as well as the lack of any declaration of a higher value in excess of the applicable package limitation, the District Court's decision limiting recovery to $500 can only be affirmed.

Appellant refers to a treaty designed to prevent smuggling by use of containers as being applicable here. This argument was made to the Court of Appeals in *Kulmer-*

land, 483 F.2d 645 by appellant's counsel, and was summarily dismissed by the Court. See 483 F.2d at 647, fn. #2.

The Customs Convention on the International Transport of Goods under cover of TIR Carnets, Volume 20 U.S. Treaties and Other International Agreements, Part 1 P. 185 *et seq.,* in spite of the detailed definition of a container:

> "lift vans, movable tank, or other similar structure,"

has no relation to a "package" within the meaning of COGSA. It in no way dictates a definition of a COGSA "package."

The TIR Convention states as its "scope," Article 2, Page 188, that:

> "This convention shall apply to the transport of goods without immediate roading, across one or more frontiers between a Customs Office of departure of one contracting party and a Customs Office of destination of another contracting party, or of the same contracting party, in road vehicles or in containers carried in such vehicles, notwithstanding that said vehicles are carried on another means of transport for part of the journey between the offices of departure and destination."

The intent of the TIR Convention was to allow the free passage of cargo in sealed road vehicles or in sealed containers carried on such vehicles, thus allowing the free movement of sealed vehicles or sealed containers between and through different nations from point of origin to point of destination.

If any international convention has any bearing on what constitutes a COGSA package, then it would be the Visby Amendments to the Hague Rules, upon which our COGSA is based. These amendments were formalized in a Protocol adopted at Brussels in 1968. The world delegates, including the United States, adhered to the proposition that the package limitation would be raised to $662.50 or .90 cents per pound, whichever is higher. However, if the internal packages of the units are enumerated in the bill of lading, they would be the packages. Where not enumerated, then the container or similar article of transportation is the package.[2] No enumeration appears on the bill of lading in this case.

The application of the package limitation to a container or a trailer is nothing new and should not come as a surprise. The question was first decided in English law almost a hundred years ago and the reasons given then are about the same as those relied on in recent cases. While the increase of the limitation amount to $500 in COGSA was to benefit shippers,[3] it should not be forgotten that the "pur-

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[2] Protocol done at Brussels, August 25, 1972, adopted at Brussels, February 23, 1968. Because of a dispute over the container clause contained in the Protocol and whether a carrier can charge a higher rate where the contents of the container are enumerated. The Protocol may not be ratified by the U.S. See Degurse, "The Container Clause" in Article 4(5) of the 1968 Protocol to the Hague Rules, 2 J. Mar. Law & Comm. 131 (1970).

[3] Before COGSA limitations of much less than $500 were upheld providing the shipper was free to choose from a choice of rates. *The Kensington*, 183 U.S. 263 (1903); *Calderon* v. *Atlas S.S. Co.*, 170 U.S. 272 (1893). The raising of the limitation was a question of "compromise" between shippers and shipowners, and it was said in committee hearings that shippers "had a tremendous advantage in raising the limit to $500." See, *The Campfire*, 156

pose of the package limitation is to protect carriers from exorbitant claims on items whose value is not discoverable because the precise nature is hidden by the package". See *Gulf Italia* v. *S.S. Exiria,* 160 F. Supp. 956 (S.D.N.Y., 1958), aff'd 263 F.2d 135 (2nd Cir., 1959). This was pointed out in *Whaite* v. *The Lancashire & Yorkshire Railway Co.,* L.R. 9 Exch. 67 (1874), an 1874 English case in which the plaintiff shipped by rail a four-wheeled wagon with wooden sides in which he packed, among other things, several valuable oil paintings. The train met with a collision and the contents of the wagon were injured. The British Carrier's Act contained a limitation of £10 per "parcel or package".

The three judges who decided the *Whaite* case held as follows:

> "Bramwell, B. I think this waggon with its contents was a 'package' within the meaning of the Act. Although one would not commonly describe it in that way, yet, looking at the object and purpose of the Act, I think we are not only entitled, but compelled to say that it was a 'package or parcel' within the section. It is to be observed that the plaintiff himself and his foreman authorize us in so describing it, for they say they 'packed' the goods in the wagon, and no one would doubt that this expression was rightly used; but if so, then the wagon so packed with goods was a package".
>
> "Clealsby, B. I am of the same opinion. It is tolerably plain that, if the plaintiff had declared the nature and value of the contents of the wagon, the

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F.2d 603 (2nd Cir., 1946); Report of Committee on Commerce, U.S. Senate, May 10, 1935, relating to Sec. 1152, pp. 18-19; House of Representatives Report No. 2218; Committee on Merchant Marine & Fisheries, relating to Sec. 1152, March 23, 1936.

> defendants would have been entitled to charge an increased rate of freight under s.2 of the Act; but this they could not do unless the wagon were a 'parcel or package'. If so, the plaintiff, not having declared, is prevented by s.1 from recovering. It would be absurd to say that the wagon was too large to be a package; plainly, size cannot be a criterion."
>
> "Pollock, B. I am of the same opinion. . . . This was clearly a parcel or package within the meaning of the Act; and the plaintiff, not having declared the value and nature of the contents, cannot recover."

The *ratio decidendi,* as may be noted, has not changed over the century which has gone by: it was the shipper who chose to use the wagon, he described it as packed, and he did not declare the valuation.

We submit that the decided cases overwhelmingly support the Court below in holding Container No. 183333 to be a package under COGSA and the liability limited to $500.

POINT II

The carriage of Container No. 183333 on the weather deck of the S.S. CONTAINER FORWARDER was not an unreasonable deviation under Section 1304(4) of COGSA.

Appellant contends in Point III of its brief that the stowage and carriage of Container No. 183333 on the weather deck of the S.S. CONTAINER FORWARDER, was an unreasonable deviation. This particular point was the subject of a separate hearing before District Court Judge Tyler on March 23, 1973. Judge Tyler allowed a further argument based solely on this question. A transcript of that oral argument was made, but has not been included in the Appendix.

Appellant's attorney in his brief on pages 24 through 27, contends that the shipper requested under deck stowage and that the carrier was guilty of a deviation because the carrier did not agree to the request.

Judge Tyler, during the course of the oral argument held on March 23, 1973, noted that in his initial Opinion and Order dated March 15, 1973, he considered the proviso "stow under deck only" (6a), but noted that the copy of bill of lading No. 5 supplied by the carrier had that proviso crossed out, indicating that it was to be disregarded (29a). Judge Tyler notes in his Opinion:

> "After this opinion was filed, it was pointed out that the bill of lading described above was in fact the carrier's office copy. The original has been submitted, varying from the above description in that the phrase

> 'stow under-deck only' is entirely blackened out and completely illegible. A copy of both the original and the office copy are appended to this opinion." See Appendix A (6a).

The original bill of lading referred to by Judge Tyler is found in the Appendix 12a. In fact, Appellant's attorney on page 7 of the transcript of the March 23rd hearing states:

> "I concede, your Honor, that stow under-deck was crossed out on the original bill of lading."

Now, Mr. Simon, in this Court, again raises this same issue of fact. This is pure nonsense and an attempt to squeeze the factual situation in this case into the Court of Appeals decision in *Encyclopedia Britannica* v. *Hong Kong Producer,* 422 F.2d 7 (2nd Cir., 1969) (hereinafter Hong Kong Producer). In that case, the shipper's freight forwarder delivered to the S.S. Hong Kong Producer at New York, an ordinary freighter, a shipment of eight containers for transportation to Yokohama, Japan. The carrier received the shipment on board and issued a short form bill of lading, which incorporated by reference all of the provisions of the carrier's regular form bill of lading. One of the provisions, Clause 13, gave the carrier the option to stow the cargo on deck unless it was informed at some time prior to delivery, that below deck stowage was required. Six containers were stowed on the freighter's weather deck and the remaining two were stowed below deck. The shipper sought recovery for the damage sustained to the six containers stowed on deck. This Court held in that case, reversing the lower Court, that: "A bill of lading that contains no statement that the goods are to be carried on deck is to be treated as

a 'clean bill of lading' and therefore, importing below deck stowage." 422 F.2d at 18.

Stowage of the six containers on deck, therefore, constituted an unreasonable deviation, which meant that the carrier was deprived of the benefit of the $500 per package limitation of liability provision contained in COGSA.

The appellant, in the instant case, urges this Court that there is no difference in the facts between the present case and the *Hong Kong Producer*. Mr. Simon brushes aside the controlling decision of this Court, *Dupont de Nemours International S.A.* v. *S.S. Mormacvega,* 493 F.2d 97 (2nd Cir., 1974) (hereinafter "Mormacvega"). In that case, cargo interests sued the owners of the S.S. Mormacvega for cargo loss in the approximate amount of $110,000 for the loss overboard at sea of one container, containing 38 pallets of teflon. The principal question raised in this case was whether the stowage of a container on the deck of a containerized cargo vessel, under a clean bill of lading, constituted an "unreasonable deviation" pursuant to 46 U.S.C. 1304(4). This Court held that in the case of unconventional stowage deviation is unreasonable when the carrier places it in an area of the ship not intended for stowage. 493 F.2d at 103.

The Court determined that such infractions did not occur on board the S.S. Mormacvega, which was a containership equipped to carry containers on deck, and concluded that no "unreasonable deviation" had occurred which would justify the ouster of the COGSA limitation liability.

The Court noted the practical problems of loading container ships:

> "To determine whether a particular container would be stowed on or below deck, a procedure dictated pri-

> marily by the practical necessities of the trade and to some extent by chance is used. . . . Whenever possible, depending on the port of call at which a given container was to be unloaded and the time of its delivery for on-loading, heavier containers were stowed below to maintain optimum stability of the vessel. Containers with flammable or explosive materials generally were stowed on deck. Cargo which was likely to suffer from exposure to the elements was stowed below to the extent possible. Cargo which was delivered to the pier after the loading process had begun, of necessity was stowed on deck." 493 F.2d at 99.

The basis for the holding in the *Mormacvega* case resulted from the interpretation of the now famous footnote 12 in the *Hong Kong Producer,* which states:

> "The defendant repeatedly makes the reference to the fact that the so-called 'container ships' carry containers on deck. This fact has no bearing on the propriety of deck stowage in the present case. A 'container ship' is specially outfitted safely to stow containers on deck. The Hong Kong Producer is a general cargo vessel and has no special rigging for the purpose. *What may be an established custom for a container ship is not the custom in the port for general cargo vessels.*" (Emphasis added.) 422 F.2d at 18.

The Court of Appeals, in the *Mormacvega* case, after reviewing the entire area of law involved in what constitutes an unreasonable deviation, found that in view of the special construction of the vessel the deck stowage of the DuPont container was excusable, justifiable and therefore

reasonable, within the meaning of Section 1304(4) of COGSA.

In the instant case, container No. 183333, was stowed on the deck of the S.S. CONTAINER FORWARDER. The CONTAINER FORWARDER was converted to a complete container carrier in 1966 and 1967. The entire vessel was converted solely for the purpose of carrying twenty and forty foot containers.

The S.S. CONTAINER FORWARDER was not a small cargo freighter like the HONG KONG PRODUCER, but was rather a full container vessel, even more so than the MORMACVEGA.

However, Judge Tyler's Order (15a-16a) was not based on the yet undecided Court of Appeals decision in the *Mormacvega* case, but rather based on the actual contract of carriage as set forth in Clause 7 of Bill of Lading No. 5. Clause 7 reads as follows:

> "Goods may be stored in container(s). Container(s) may be stowed on deck (unless this bill of lading is caused 'stow under deck' on the face hereof) and when so stowed shall be deemed for all purposes to be stowed under deck."

It should be noted that on the face of the printed bill of lading, it is noted in the "Acceptance" clause that "Containers may be stowed on Deck, as per Clause 7" (12a-13a).

Judge Tyler also found that before the signing of the bill of lading, which is evidence of the contract of carriage, the carrier blocked out in solid black ink the words, "Stow under-deck only," so that it became illegible on the shipper's copy. (See 12a.) The lower Court also found that

Santini Brothers accepted the bill of lading as changed (16a).

The appellee, American Export Lines, Inc., is a member of the North Atlantic Continental Conference and is subject to the tariff rules and regulations of that Conference filed with the Federal Maritime Commission as Freight Tariff 29 FMC-4. This tariff in part is attached to the Appendix at 49a. The lower Court found that the CONTAINER FORWARDER was subject to this Conference as the vessel was trading in the area of the North Atlantic Conference's jurisdiction. The tariff rules and regulations contain a Trailer/Container Traffic General Rule No. 13(C), which provides as follows:

> "Since it is necessary that Containers be stowed on or under deck at the Member Lines' option, Bill of Lading specifically clausedprovides under deck stowage will NOT be issued."

The lower Court found that as a result of this regulation, the carrier could not issue "under deck" bills of lading.

It is important to note that the regular American Export Lines' form bill of lading prepared by Santini Brothers incorporated the Conference Rules. Clause 19 reads as follows:

> "19. Any bookings, freight engagements, or other agreements relating to the shipment previously made are superseded by this bill of lading and by the Carrier's Freight Tariff Rules and Regulations, which shall be deemed incorporated herein as if set forth at length. The Carrier's Freight Tariff Rules and

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> Regulations are filed with the Maritime Commission, Washington, D.C. and are also available at any of the Carriers' offices" (17a).

The leading admiralty commentators, Professors Gilmore and Black, in their second edition of the Law of Admiralty (1975) at Page 183, explain why container vessels cannot promise under deck stowage:

> "Most containers are designed to be carried safely on deck, and, for technical reasons of ship's balance, and loading and unloading, it can not be foretold which of the ship's load of containers it will be necessary to carry on deck. It is therefore often, (if not normally) impossible to issue a 'below deck' bill of lading at the time of receipt of the container. On the other hand, the issuance of a 'on deck' bill takes the goods out of the protection of COGSA, and so impairs or destroys the commercial acceptability of the bill of lading—and may turn out to have been quite unnecessary, since in fact the container may be carried below-deck."

See also Bissell, "The Operational Realities of Containerization, etc.," 45 Tulane Law Review 902, 917-920 (1971).

Santini Brothers, as professional freight forwarders, knew or should have known that the request for an under-deck bill of lading was contrary to the Rules. Granting Santini Brothers' request would have resulted in the type of discrimination Mr. Simon cites at Page 25 of his brief. Judge Tyler found Santini Brothers accepted the change because Mr. Simon could not show they ever objected or protested. The District Court's Order, dated March 27, 1973, denying Plaintiff's cross-motion was correct in all respects.

CONCLUSION

The decision of the District Court limiting the recovery of the Plaintiff-Appellant to $500 should be affirmed.

Respectfully submitted,

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M. E. DEORCHIS,
BRIAN D. STARER,
Of Counsel.

First Class OVERSEAS

SAFE...SWIFT...DEPENDABLE OVERSEAS HOUSEHOLD MOVING "UNDIVIDED RESPONSIBILITY"

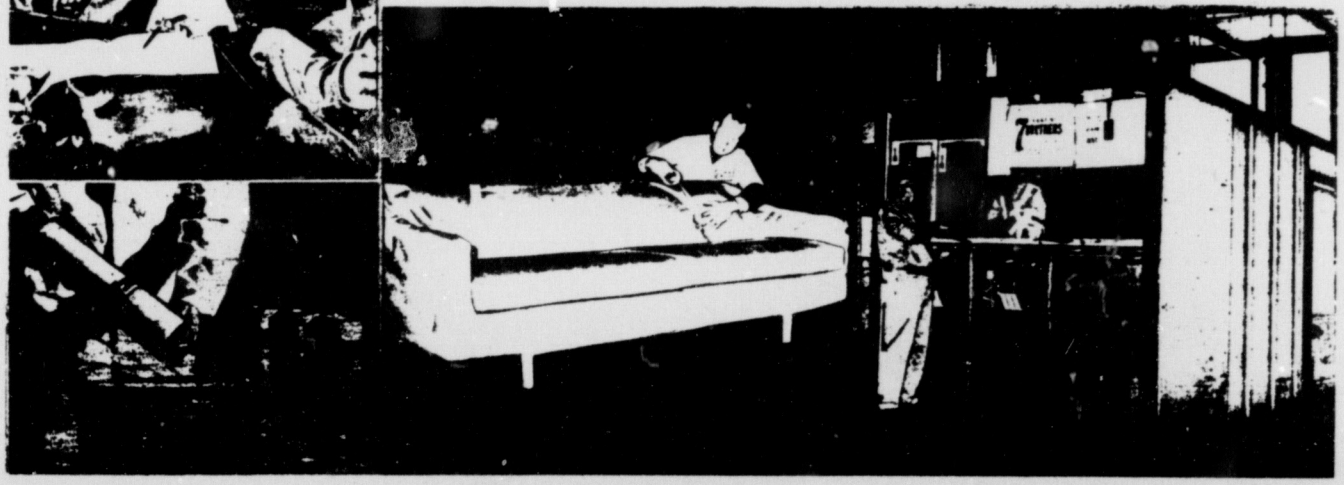
ESTIMATE/PRE-PLANNING — Your household effects are carefully examined by a well trained estimator. Your entire removal is pre-planned in advance enabling you the opportunity to prepare for your relocation to a new country.

"CARE — NOT REPAIR" — The 7 Brothers team entrusted to pack your delicate china, glassware and other fragile items, are packing experts with many years of experience. Each and every item is individually wrapped in special corrugated protective sheets, thus affording maximum safety to your goods while enroute.

WRAPPING/PADDING — All furniture, tables, couches, beds and even rugs, are wrapped and padded for complete safety and protection, prior to being packed inside the container which will transport them across the ocean. This precaution protects against any possible rubbing or shifting of furnishings while in transit.

CLOTHING/LAMP SHADES/APPLIANCES — Plus a sundry of other household effects, are packed into specially designed cartons geared expressly for its specific usage. Lamp shades are individually wrapped, nested and placed in their own carton. Appliances are pre-serviced and wrapped in special furniture pads prior to packing within the shipping container.

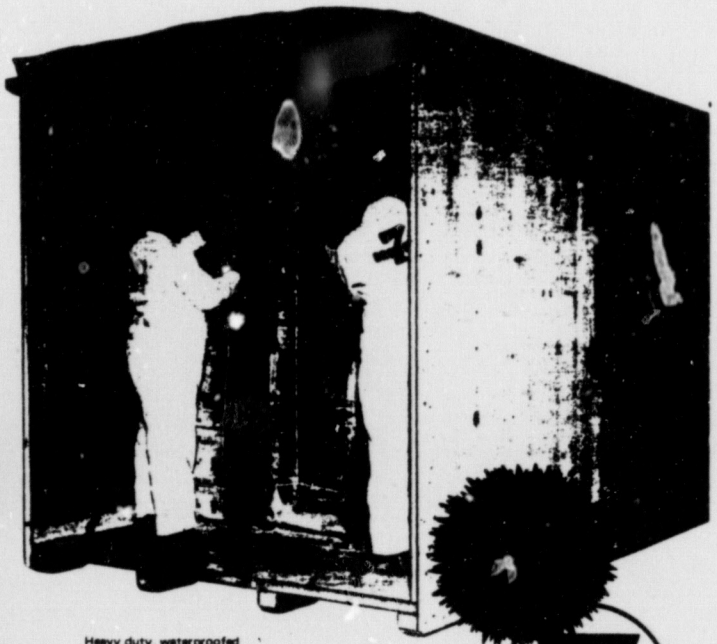
INVENTORY — A complete and accurate inventory is prepared on every move. All household goods and their condition are noted prior to being packed and placed into the shipping container. A copy of the detailed inventory is presented to the shipper, copies are forwarded to destination and additional copies are furnished upon request.



HOUSEHOLD MOVING

The 7 Santini Brothers world wide moving service is designed to satisfy the family moving abroad, the executive or key employee being transferred overseas. Because of our many years in this business, we are in a position to perform a "First Class" overseas moving service at no extra cost. One of the many features of the 7 Brothers service is their "Undivided Responsibility" for your possessions from origin to destination.

The 7 Brothers handle the complete origin service. In conjunction with overseas FIDI agents, we provide the thru - services necessary to complete your move from origin to destination. The 7 Brothers office staff is well trained in all phases of export procedures, thus they will assist in analyzing customs requirements, arrange for any necessary export licenses, and effect customs clearance and forwarding to any point in the world. All the details can be left safely to the 7 Brothers and from their many years of experience they will render the finest "First Class" transfer.



Heavy duty, waterproofed wooden lift van container being loaded with household effects for shipment overseas.

19

ATTACHMENT C

Service of three (3) copies of the within
is admitted this 24 day of July 1975

Graham & Simon

Attorney for Pltf

Affidavit

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775